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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1955

No. 264

STATE OF WISCONSIN EX REL. SAVELAND PARK HOLDING CORPORATION,

Petitioner,

—vs—

DONALD G. WIELAND, BUILDING INSPECTOR OF VILLAGE OF FOX POINT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Certiorari should not be granted because:

A. The main issue presented was the authority for a municipality to adopt an ordinance under the state law which question is not reviewable.

B. No substantial Federal question is involved.

A.

Determination of the scope of state law not reviewable by this Court.

The Wisconsin Supreme Court determined that the Village had authority to adopt the ordinance. So far as this is a determination of the authority of the Village under Wisconsin law it is binding on and not reviewable by this Court.

Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018.

Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398.

Neblett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

B.

The arguments seeking to show a violation of the Fourteenth Amendment to the United States Constitution are so tenuous that no substantial Federal question is presented.

1. Protection of property.

The argument is made point 1 of petitioner's brief that under the Fourteenth Amendment to the U. S. Constitution an individual's right to use his property cannot be curtailed solely for the protection of other property values. In just what respect an ordinance the purpose of which is solely to protect property values violates any provision of the Fourteenth Amendment is not stated. Petitioner's error lies in the fact that he considers the exercise of police power must be related to public health, safety, or morals and that it may not operate for the general welfare. We believe this contention is adequately answered in the Supreme Court of

Wisconsin's opinion, 269 Wis. p. 268, 69 N. W. (2nd) p. 220, petitioner's brief Pages 46 and 47.

Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842, cited by petitioner, Page 9 of its brief, has no bearing on the question. That case involved the inclusion of industrial land in a residential district.

The case of *Standard Oil Co. v. Bowling Green,* 244 Ken. 362, 50 S. W. (2nd) 960, 86 A. L. R. 648, cited by petitioner, Page 10 of its brief, has no bearing on the case at bar. In the Kentucky case, the ordinance attacked was passed five years after the plaintiff's filling station had been built and prohibited the establishment *and operation* of a filling station in the residence district created by the ordinance. The sole question presented and determined in that case was whether or not the ordinance, as applied to this pre-existing use, was valid. The evidence established that the operation of the filling station had not been detrimental to persons or property in the neighborhood and that the land on which the filling station was situated was small and almost its entire value was its availability as a filling station. The Court further pointed out that the economic and aesthetic values of the land in the neighborhood so far as they were affected by the filling station had been fixed some years before the ordinance was passed, and the continuation of the filling station would not adversely affect to a further degree the economic or aesthetic status of the neighborhood as it was at the time the ordinance was passed. The Kentucky Court stated, S. W. p. 963, A. L. R. p. 652:

> "Perhaps it may be true, if the phrase 'general welfare' is to include the protection of economic values of adjacent property, the establishment of new service stations may be prohibited in order to protect such value, but that is a different question from ousting a service station already there, and where, as here, the

> economic value of adjacent property has long since been fixed by the location of the station. It may, indeed, even be true that abolition of such service stations from such a residential neighborhood would serve to improve the economic value of the territory left."

Then follows the quotation set forth in petitioner's brief.

Thus, the Kentucky Court case decided simply that the Bowling Green ordinance could not be applied to *eliminate a pre-existing use for the purpose of increasing property values.* In the case at bar there is no attempt to eliminate a pre-existing use and no attempt to increase property values.

Likewise, *Elizabeth Lake Estates v. Waterford,* 317 Mich. 359, 26 N. W. (2nd) 788, has no bearing on this case for it simply determined the extent of zoning power of municipalities under Michigan statutes.

Petitioner seeks to distinguish *State ex rel. Beery v. Houghton* 164 Minn. 146, 204 N. W. 569, affirmed 273 U. S. 671, 47 S. Ct. 474, 71 L. Ed. 832, on the basis that it was simply the same as *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303. A reading of the decision of the Minnesota Supreme Court in the Berry case in which that Court overruled previous decisions shows the *ratio decidendi* was that the construction of apartment buildings in a residential district destroys the value of the residential lots and depreciates very much the value of the whole territory; the Minnesota Supreme Court holding that an ordinance to prevent this depreciation of property was valid, which was affirmed by this Court. Expressed in the affirmative, that case held that it was a valid exercise of the police power to adopt an ordinance to protect and preserve existing property values.

2. Aesthetics

Under points 2 and 3 of its brief, petitioner argues that an owner's taste cannot be curtailed solely for aesthetic reasons and that censorship cannot be exercised over a creative art. *Assuming* this ordinance was based on aesthetics and did censor a creative art, wherein this violates a right protected by the Fourteenth Amendment to the United States Constitution is not stated.

Further, reading of Section 1 of the ordinance shows the fallacy of these arguments. An owner's taste is not curtailed *solely* for aesthetic reasons and there is no censorship over a creative art. The ordinance permits *any type* of architecture *anywhere* in the Village. It is only when the building which a property owner seeks to erect is so extreme that it will substantially, adversely affect other properties that the owner is restricted in his right to use his property. So long as he affects only himself, the owner may do what he pleases on his property. The prevention of harm to others is what the ordinance prohibits and for this the owner receives the same protection in that other property owners may not harm his property.

Ordinance No. 129 is merely an exercise of the police power to effectuate the old common law maxim *sic utere tuo ut alienum non laedas.*

Petitioner seeks to distinguish *Berman v. Parker,* 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed.* 63 on two grounds:

(1) that it was a condemnation case involving the power of eminent domain,

(2) that the objective sought was the elimination of slums and blight and breeding grounds for crime and disease,

stating that neither of these items are present in the case at bar.

It is true, of course, that the *Berman* case did involve the question of eminent domain but as this Court expressly pointed out in the decision the issue involved was the exercise of police power. Eminent domain is merely one method of exercising the police power. An ordinance of the type at bar is simply another manner and instance of the exercise of the same police power. As to the second distinction, it is a similarily rather than a distinction. Certainly the preservation of property values, as governed by Ordinance No. 129, is one method of preventing the creation of slums and blight in the first instance.

As previously stated, Ordinance No. 129 does not control aesthetics. It makes no effort to tell an owner of property what type of building he shall erect on his property. It simply prevents him from substantially, adversely affecting other property. Even if the ordinance was based solely on aesthetics, it is not unconstitutional.

The following quotation from the *Berman* case clearly shows the validity of this ordinance.

75 S. Ct. p. 102;

> "The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See *District of Columbia v. Thompson Co.*, 346 U. S. 100, 108. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government; purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature

has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsh,* 256 U. S. 135) or the States legislating concerning local affairs. See *Olsen v. Nebraska,* 313 U. S. 236; *Lincoln Union v. Northwestern Co.,* 335 U. S. 525; California State Association v. Maloney, 341 U. S. 105****.

Public Safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See *Noble State Bank v. Haskell,* 219 U. S. 104, 111*****.

"****The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri,* 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary. there is nothing in the Fifth Amendment that stands in the way."

Likewise, there is nothing in the Fourteenth Amendment that stands in the way of the adoption and enforcement of Ordinance No. 129.

Petitioner further attempts to distinguish the *Berman* case by citing the statistics as to the number of buildings

which were beyond repair, had no inside toilets, no bath, etc. This distinction falls when it is remembered that the question presented in the *Berman* case was the applicability of the Act of Congress to the plaintiff's property, which property it was conceded was in no respects substandard and was not even residential property.

See *Opinion of the Justices,* Massachusetts Advance Sheets (1955) p. 823.

3. Due Process

The argument is made under point 5 in the brief supporting the petition that because of wide discretion given to the Building Board without an objective standard, petitioner is denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Building Board is given no discretion and there is a definite standard to be applied. As shown by Section 1 of the ordinance, the Building Board determines the *fact* whether or not the proposed structure, if erected, will cause a substantial depreciation of the property values in the neighborhood.

The value of property is a fact constantly determined in applying various laws. It must be determined by the assessor in assessing property for real estate taxes; it must be determined by appraisers in appraising property in an estate for estate and inheritance taxes; it must be determined in fixing damages on condemnation; it must often be determined in litigation between individuals, such as ascertaining loss on an insurance claim in the event of fire or other casualty, and in determining damages in breach of contract actions.

Determining whether or not a proposed structure will depreciate property values in the area is simply the reverse

of the common question that must be answered in the assessing of benefits as a special assessment resulting from a public improvement where the question must be determined whether or not the public improvement benefits property, and if so what property and to what extent.

At page 21 of its brief, petitioner argues that the Building Board may operate in an abitrary manner. Possibly this is so, just as any officer or administrative board or even a Court may operate in an arbitrary manner; but this does not make the law unconstitutional.

All laws are administered by men and, because of this, there is always a possibility that the person administering the law will err or even act arbitrarily because of personal reasons. That this human element exists and does not render an ordinance invalid, was recognized in:

Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, at Wis. p. 607.

> "It is a mistake to suppose that a government by law contemplates law to protect one in liberty to do whatever he sees fit and do it as he sees fit. When we say, ours is a government by law and not by men, we mean that ours is a government based on rights with laws to preserve and conserve those rights, and men to administer those laws. There must be the human element or there could be no administration. Without administration, law would have no vitality. Without law to preserve and conserve rights, vitalized by proper administration, there would be no rights and the very purpose for which governments are founded would fail of effectuation."

It is because of such possibility of arbitrary action as well as error that an appeal to higher Courts are given.

Section 4 of Ordinance No. 129 expressly gives the right of appeal to the Board of Appeals of the Village of Fox Point.

This Board of Appeals is a statutory board required by Wisconsin Statute Section 62.23(7)(e). While this section of the Wisconsin Statutes refers to cities, it also applies to villages pursuant to Wisconsin Statute Section 61.35.

After the decision by the Board of Appeals, a person feeling aggrieved may apply to the Court for the issuance of writ of certiorari. Contrary to the usual situation on the issuance of writ of certiorari, the Court in reviewing the matter is not confined to the record that has been made below but may receive additional evidence. Wisconsin Statute Section 62.23(7)(e), 10, 11, 12 and

> "13. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence, or appoint a referee to take such evidence as it may direct and to report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

From the decision of the lower Court, appeal may be taken to the Supreme Court of the state.

Wisconsin Statutes Section 274.09 Appeals to supreme court, where allowed.

> "(1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts****and from any court of record having civil jurisdiction when no other court of appeal is provided.****
>
> (2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions ****and whether or not the right to appeal is given by the statute which creates the rights, remedy or proceeding."

At each step of the proceeding, the question to be determined is whether or not the Building Board has properly applied the test in the ordinance; and has correctly determined the fact as to whether or not the proposed structure, if erected, will substantially depreciate property values in the neighborhood.

It is, of course, true that experts may differ in their opinion in respect to this test, just as experts may differ whenever the question of the values of property is called in consideration, or the effect of proposed construction on such property as is the case whenever the question is considered as to whether or not a proposed public improvement will benefit adjacent property, and if so, how much. That experts may differ does not make the test indefinite or invalid. Courts exist for the purpose of correcting an erroneous application of such a test.

It must be remembered that before acting in the first place, under the ordinance the Building Board is required to view the site of the proposed structure and to examine the application papers for a building permit which shall include exterior elevations of the proposed structure.

In view of the above discussed procedure, it is difficult to see how petitioner can even argue that he is denied due process of law.

4. Equal Protection

Petitioner in Item 5 agues that it is denied the equal protection of the law guaranteed by the Fourteenth Amendment. It is difficult to understand from petitioner's brief in just what respect it contends that it is denied the equal protection of the law. Apparently, it is on the basis that the Building Board may act arbitrarily and not apply the test in the ordinance correctly. No arbitrary action by the

Building Board is alleged or shown. This Court will not assume that the Board has acted arbitrarily, but in this proceeding attacking, not action by the Building Board under the ordinance, but the validity of the ordinance, must consider that the Building Board acted in accordance with the provisions of the ordinance and found as a fact upon sufficient evidence that petitioner's proposed structure would, if erected, substantially, adversely affect the value of other property in the immediate neighborhood.

As above discussed, ample opportunity is afforded petitioner for relief from any incorrect, improper or arbitrary application of the ordinance. As a reading of the ordinance shows, it applies to every property in the Village, so that petitioner receives the same protection from depreciation to its property that the ordinance gives to other properties.

At Page 23 of its brief, petitioner argues that there is an unconstitutional delegation of powers. Citing *Washington ex rel. Seattle Title and Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50. There is no analogy between this case and the case at bar. In the *Roberge* case, there was an ordinance dividing the City into certain use districts, one provision of the ordinance was to the effect that no old people's home should be permitted in a residence district without first obtaining the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. This provision was attacked as an unconstitutional delegation of legislative power. The Court in upholding this contention pointed out that the action of the property owners was uncontrolled by any standard or rule prescribed by legislative action, that there was no provision for review under the ordinance, that the property owners were not bound by any official duty but were free to withhold consent for selfish reasons or arbitrarily and could subject the Trustee to their will or caprice.

None of these factors exist in respect to Ordinance No. 129. There is a definite standard in the ordinance which is applied by the Building Board and property owners cannot by their action determine whether or not the standard shall be applied. Further, the standard is applied by an official body, the Building Board, and from their determination there is a right of appeal.

Consider *Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board,* 236 Wis. 329, 294 N. W. 632, affirmed 315 U. S. 437, 86 L. Ed. 946, 62 S. Ct. 706, where it was held that the Statute under consideration, which provided that employees engaged in concerted picketing or a boycott or similar acts, would be guilty of an unfair labor practice unless a majority of the employees had voted to strike, was not an unconstitutional delegation of legislative power to the majority.

This question was also considered in *State v. Wakeen,* 263 Wis. 401, 57 N. W. (2nd) 364, where the Court at Wis. p. 409 quotes with approval the general rule:

> "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The test to be applied is definitely established by the ordinance and there is no delegation to anyone of any power to determine what the terms or provisions of the ordinance shall be.

5. No substantial Federal question is presented.

We submit the above clearly shows that no substantial Federal question is presented. *Fischer v. St. Louis,* 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018, *State of Wisconsin ex rel. Wisconsin Lutheran High School Conference v. Sid. H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, E. L. Vanderjagt,* 267 Wis. 91, 65 N. W. (2nd) 43, appeal dismissed for want of a substantial Federal question, 349 U. S. 913, 99 L. Ed.* 504, 75 S. Ct. 604.

In *Lionshead Lake, Inc. v. Wayne Township* 10 N. J. 165, 89 A. (2nd) 693, the appeal dismissed for want of a substantial Federal question, 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708. Petitioner seeks to distinguish this case on the basis that New Jersey cases are peculiar to that state and interpret zoning powers granted by the New Jersey constitution. While this may be so, in the case at bar the Wisconsin Supreme Court has interpreted the power given to the Village of Fox Point to enact Ordinance No. 129 in favor of the existence of such power which is a question of state law; and just as in the interpretation of New Jersey law, no substantial Federal question is presented in this interpretation of Wisconsin law.

Neblett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

CONCLUSION

We request that the petition for a writ of certiorari be dismissed because the issue determined by the Wisconsin Supreme Court was one of state law and no substantial Federal question is presented.

Respectfully submitted,

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